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MICHAEL RODAK, JR.

No. 73-1398

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT LEICHMAN, JR.,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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ARGUMENT FOR DENIAL OF WRIT

I.

THE DECISION UPHOLDING THE EXEMPTION FROM JURIES OF CITIZENS WHO ARE FEMALES DOES NOT DEPRIVE THE DEFENDANT OF THE IMPARTIAL JURY REQUIRED BY "DUE PROCESS AND EQUAL PROTECTION OF THE LAWS" GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Louisiana procedure for selection of jurors in both civil and criminal cases provides that no women shall be drawn for jury service unless they shall have previously filed with the clerk of the Dis-

trict Court a written declaration of her desire to be subject to such service. LA. CONST. art. VII, § 41, LA. CODE CRIM. P. art. 402.[1]

Following the decision in *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed. 2d 118 (1961), the Supreme Court of Louisiana has consistently held that the Louisiana exemption procedure for selection of jurors does not violate the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution. *State v. Davis*, 278 So.2d 130 (La. 1973), *State v. Enloe*, 276 So.2d 283 (La. 1973); *State v. Curry*, 262 La. 280, 263 So.2d 36 (1972); *State v. Daniels*, 262 La. 475, 263 So.2d 859 (1972); *State v. Reese*, 250 La. 151, 194 So.2d 729 (1967), cert. den., 389 U.S. 996, 88 S.Ct. 485, 19 L.Ed. 2d 495; *State v. Comeaux*, 252 La. 481, 211 So.2d 620 (1968); *State v. Pratt*, 255 La. 919, 233 So.2d 883 (1970); *State v. Alexander*, 255 La. 941, 233 So.2d 891 (1970), reversed on other grounds, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536; *State v. Sinclair*, 258 La. 84, 245 So.2d 365 (1971), death sentence vacated on other grounds, 408 U.S. 939, 92 S.Ct. 2871, 33 L.Ed.2d 760; *State v. Millsap*, 258 La. 883, 248 So.2d 324 (1971); *State v. Amphy*, 259 La. 161, 249 So.2d 560 (1971), cert. den., 405 U.S. 1074, 92 S.Ct. 1502, 31 L.Ed.2d 808.

This Court in *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), was presented with

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[1] See LA. CONST. art. VII, § 41 and LA. CODE CRIM. P. art. 402 set out in full in Appendix A.

an identical issue concerning the constitutionality of a Florida statute which was almost identical to the Louisiana provisions. This Court upheld the constitutionality of the Florida statute stating:

> "We cannot say that it is constitutionally impermissable for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." *Hoyt v. Florida*, 368 U.S. 57, 62, 82 S.Ct. 159, 162-163.

In determining the due process requirements in the context of jury selections this Court established that a defendant need only be afforded a jury from which there has been no arbitrary exclusion of any particular group of individuals.

> "[Due process] requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusions." *Hoyt v. Florida*, 368 U.S. 57, 59, 82 S.Ct. 159, 161.

The Louisiana provisions do not exclude women from jury service but merely provide an exemption to women unless they declare otherwise. The respondent recognizes that merely because a statute provides an exemption, it may not be considered an exclusion *per se*. The issue becomes whether the exemption is based on a reasonable classification and whether the manner of exercise rests on some rational foundation.

> "Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation." *Hoyt v. Florida*, 368 U.S. 57, 61, 82 S.Ct. 159, 162.

In the *Hoyt* case, this Court concluded that there was a rational basis for distinguishing men from women. The respondents contend that a similar conclusion is entirely reasonable in the case at hand in that the Louisiana provisions are virtually identical to the Florida provisions.

Petitioner argues that *Hoyt* is distinguishable from the facts of the case at hand, in that while there was not a total exclusion of women from jury duty by the Florida jury statutes, there is a virtual total absence of women from jury service in Louisiana. Petitioner further argues that this resulted in there being no true cross section of the community on the jury, citing *Smith v. Texas*, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed.2d 84 (1940).

Petitioner contends that although this argument has merit, the test as established in *Hoyt*, is whether the exemption is based on a reasonable classification and whether the manner of exercise rests on some rational basis. This test, it is contended, is adequately met by the Louisiana provisions. In addition, the *Smith* case is readily distinguishable from the facts of this case as was discussed in *Hoyt*.

> "This case in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service. E.g. *Hernandez v. Texas*, supra; *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; *Smith v. Texas*, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940)." *Hoyt v. Florida*, 368 U.S. 57, 68, 82 S.Ct. 159, 166 (1961).

Petitioner alternatively contends that *Hoyt* should be reconsidered in light of *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 90 S.Ct. 518 (1970). Respondent contends that the *Carter* case is distinguishable from the case at hand for the same reasons as the *Smith* case.

II.

THE DECISION OF THE SUPREME COURT OF LOUISIANA DID NOT DENY PETITIONER A FAIR AND IMPARTIAL TRIAL BY JURY AS REQUIRED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner contends that the facts and circumstances of the case at hand are directly in point with those in the case of *Rideau v. Louisiana*, 373 U.S. 727, 83 S.Ct. 1417 (1963). As a consequence, petitioner argues that he was denied a fair trial due to prejudicial pretrial publicity. Comparison of the facts of these two cases readily demonstrates that at no point during the entire proceedings of the case at

hand was there ever any publicity even remotely resembling the "televised interview" of the defendant in the *Rideau* case.

Clearly the burden of proving unfairness is on the petitioner.

> "[I]t is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside . . ." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed. 268 (1942).

Petitioner contends that prejudicial pretrial publicity occurred as a result of three factual newspaper accounts printed over approximately a one-month period of time in two parish newspapers, activities occurring on the night of the murder two months before the trial and the familiarity of prospective jurors with the publicity accompanying the case.

In determining whether the petitioner has been deprived of his constitutional right to an impartial jury it is necessary to examine the publicity involved, the hearing on the motion for change of venue and the record of the *voir dire* examination.

The primary pretrial publicity consists of a series of three factual stories about the incident prior to the trial on June 6, 1973. (See defendant's exhibits 1 through 6, copies of newspaper articles, Bill No. 4, Tr. P. 2) These articles basically consisted of a full factual account of the incident on April 12, 1973; a two paragraph account of the indictment on April 19, 1973; and a one paragraph reference to a sanity

hearing on May 17, 1973. These stories appeared in the two parish newspapers which had a total circulation of 3,500 in a parish of 18,000 population. (Bill No. 4, Tr. P. 2). Despite petitioner's characterization of the accounts as "spectatular (*sic*) and inflamatory," (*sic*) a reading of the accounts demonstrates only factual stories which are neither unusual or sensational.

The most persuasive evidence for assuming pretrial publicity is found in the activities of the crowd which gathered the night the incident took place. There is no evidence to indicate that such activity occurred at any other time.

The record gives a more revealing indication of the effect of the publicity in the hearing on the motion for change of venue. The motion for a change of venue was heard two days before the trial on the merits. Defendant called several witnesses, all testifying that the defendant could receive a fair trial in Union Parish except the defendant's daughter who testified that a fair trial could not be received. (Bill No. 4, Tr. P. 204-273)

The only other evidence indicating the effect of the publicity is found in the testimony of five prospective jurors which the defendant challenged for cause. The testimony of these prospective jurors on *voir dire* indicated initial reservations as to the presumption of innocence, failure to understand certain questions, or friendship with the victim. In each case, the trial judge satisfied himself that the juror would accept

the instruction of the court and render an impartial verdict. For the specific testimony on *voir dire* of these jurors, see Bill No. 5, Tr. P. 6, 8; Bill No. 6, Tr. P. 2, 3, 4; Bill No. 7, Tr. P. 1, 2, 4; Bill No. 9, Tr. 1, 3; Bill No. 10, Tr. P. 1, 3, 4.

Recognizing that the right to a trial before a fair and impartial tribunal "is a basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), the caveat must also be kept in mind that:

> "It is not required however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of this case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Irvin v. Dowd*, 366 U.S. 717, 722-723, 81 S.Ct. 1639, 1642 (1961).

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the writs herein applied for should be denied.

Respectfully submitted,

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By: s/Walter L. Smith Jr.
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Dated: May 27, 1974

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing has been mailed, postage prepaid, to Stephen J. Katz, 709 Jackson Street, Monroe, Louisiana, attorney for petitioner.

Baton Rouge, Louisiana, this 27th day of May, 1974.

s/Walter L. Smith, Jr.
WALTER L. SMITH, JR.

APPENDIX A

Art. 7 §41 DISTRICT COURTS

§ 41. Selection of jurors; women jurors; trial by judge; trial by jury

Section 41. The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

Art. 402. Service of women as jurors

A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

Source: Former R.S. 15:172.1; Const. Art. VII, § 41.